The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. The role of the committee is to examine the technical qualities of all disallowable instruments of delegated legislation and decide whether they comply with the committee's non-partisan scrutiny principles of personal rights and parliamentary propriety.

Senate Standing Order 23(3) requires the committee to scrutinise each instrument referred to it to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for parliamentary enactment.

Nature of the committee's scrutiny

The committee's longstanding practice is to interpret its scrutiny principles broadly, but as relating primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister or instrument-maker seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments under the *Legislative Instruments Act 2003*.[1]

Publications

The committee's usual practice is to table a report, the *Delegated legislation monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable instruments of delegated legislation for the preceding period. Disallowable instruments of delegated legislation detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.[2]

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1 For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13th Edition (2012), Chapter 15.

2 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Index of instruments*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

Structure of the monitor

The monitor is comprised of the following parts:

- **Chapter 1 New and continuing matters**: identifies disallowable instruments of delegated legislation about which the committee has raised a concern and agreed to write to the relevant minister or instrument-maker:
  - (a) seeking an explanation/information; or
  - (b) seeking further explanation/information subsequent to a response; or
  - (c) on an advice only basis.
- **Chapter 2 Concluded matters**: sets out matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.
- **Appendix 1 Correspondence**: contains the correspondence relevant to the matters raised in Chapters 1 and 2.
- **Appendix 2 Consultation**: includes the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.

Acknowledgement

The committee wishes to acknowledge the cooperation of the ministers, instrument-makers and departments who assisted the committee with its consideration of the issues raised in this monitor.

General information

The Federal Register of Legislative Instruments (FRLI) should be consulted for the text of instruments, explanatory statements, and associated information.[3]

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.[4]

The Disallowance Alert records all notices of motion for the disallowance of instruments in the Senate, and their progress and eventual outcome.[5]

Senator John Williams (Chair)

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3 The FRLI database is part of ComLaw, see Australian Government, ComLaw, https://www.comlaw.gov.au/.

4 Parliament of Australia, *Senate Disallowable Instruments List*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List.

5 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert 2015*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation received by the Senate Standing Committee on Regulations and Ordinances (the committee) between 18 September 2015 and 22 October 2015 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

Response required

The committee requests an explanation or information from relevant ministers or instrument-makers with respect to the following concerns.

Instrument	**Australian Passports (Application Fees) Amendment Determination 2015 (No. 1) [F2015L01629]**
Purpose	Provides for an application fee for the issue of a replacement passport in 'exceptional circumstances'
Last day to disallow	3 December 2015
Authorising legislation	*Australian Passports (Application Fees) Act 2005*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The instrument amends the Australian Passports (Application Fees) Determination 2015 to provide for an application fee for the issue of a replacement passport in 'exceptional circumstances'. The committee notes that the fee will be $151, in line with the current fee that applies to applications for replacement passports in a range of circumstances. However, the explanatory statement (ES) does not explicitly state the basis on which the fee has been calculated for this new category of circumstances.

The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of a change to a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated.

The committee requests the advice of the minister in relation to this matter.

Instrument	**Charter of the United Nations (Sanctions—Syria) Regulation 2015 [F2015L01463]** **Charter of the United Nations (Sanctions—Iraq) Amendment Regulation 2015 [F2015L01464]**
Purpose	Implements UN Security Council Resolution 2199 relating to Syria in Australia; amends the Charter of the United Nations (Sanctions—Iraq) Regulations 2008 to implement UN Security Council Resolution 2199
Last day to disallow	3 December 2015
Authorising legislation	*Charter of the United Nations Act 1945*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(b)

Unclear meaning of the term 'illegally removed'

These regulations give effect in Australia to obligations arising from United Nations Security Council resolution 2199 (2015), which imposes sanctions on Syria and Iraq. The resolution was adopted under Chapter VII of the Charter of the United Nations on 12 February 2015, and is therefore binding on Australia. Paragraph 17 of the resolution requires United Nations member states to take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990, and from Syria since 15 March 2011.

The regulations create offences which are triggered if a person does not comply with the written directions of the Secretary of the Department of Foreign Affairs and Trade regarding 'illegally removed cultural property'.

With reference to the above, the committee notes that the regulations define 'illegally removed cultural property' as an item of:

- Syrian/Iraqi cultural property; or
- archaeological, historical, cultural, rare scientific, or religious, importance;
- that has been illegally removed from Syria on or after 15 March 2011, or from Iraq on or after 6 August 1990.

However, neither the regulations nor the ESs expressly define what the concept of 'illegally removed' means. In particular, it is unclear whether this is to be understood with reference to Syrian/Iraqi, international or Australian law, and whether the concept applies as at the time of the alleged removal of the cultural property or as at a later point in time (for example, when the secretary is considering the making of a written direction).

The committee requests the advice of the minister in relation to this matter.

Retrospective effect

Section 4 of the first regulation provides that 'illegally removed cultural property' is that which has 'been illegally removed from Syria on or after 15 March 2011'.

Item 1 of schedule 2 to the second regulation amends the definition of 'illegally removed cultural property' in the Charter of the United Nations (Sanctions—Iraq) Regulations 2008. The new definition defines this as that which has 'been illegally removed from Iraq on or after 6 August 1990', which effectively expands the type of property covered by the regulation.

The committee notes that, although the instruments are not strictly retrospective, the new definitions operate such that the regulations will apply to antecedent facts (that is, the previous removal of cultural property from Syria or Iraq). As a consequence, it appears that persons may have performed acts prior to the commencement of the regulations that are now caught by the offence provisions described above. The committee notes that, while the relevant offences relate to a failure to comply with a direction (this direction-making power operating prospectively), the definitions on which the offences rely refer to antecedent facts.

The committee's usual approach to such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)).

The committee's usual expectation is therefore that the statements of compatibility address the question of any retrospective effect and provide a justification for this approach (particularly where a person's rights or liberties may be adversely affected). However, in this case the committee notes that no explanation is offered.

The committee requests the advice of the minister in relation to this matter.

Insufficient information regarding strict liability offences

The first regulation creates a strict liability offence for failing to comply with a direction from the Secretary of the Department of Foreign Affairs and Trade, the Secretary of the Arts Department or a member of the Australian Federal Police or the police force of a state or territory in relation to illegally removed cultural property of Syria.

The second instrument amends the Charter of the United Nations (Sanctions-Iraq) Regulations 2008 to create a similar strict liability offence in relation to illegally removed cultural property of Iraq.

Given the limiting nature and potential consequences for individuals of strict and vicarious liability offence provisions, the committee generally requires a detailed justification for the inclusion of any such offences (particularly strict liability

offences) in delegated legislation. The committee notes that in this case the ESs provide no explanation of or justification for the framing of the offences.

The committee requests the advice of the minister in relation to this matter.

Instrument	**Christmas Island Marine Traffic and Harbour Facilities Determination 2015 [F2015L01591]** **Cocos (Keeling) Islands Marine Traffic and Harbour Facilities Determination 2015 [F2015L01593]**
Purpose	The instruments set the Port charges for Christmas Island and Cocos (Keeling) Island Ports and the Port conditions for cargo movement on the wharf area of Christmas Island Port
Last day to disallow	3 December 2015
Authorising legislation	Utilities and Services Ordinance 1996
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining charges

Schedule 1 of these instruments sets the Port charges for the Christmas Island and Cocos (Keeling) Island Ports.

The committee's usual expectation in cases where instruments of delegated legislation carry financial implications via the imposition of a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated. With reference to these requirements, the committee notes that the ESs for these instruments provide no indication as to the basis on which the fees have been calculated or set.

The committee requests the advice of the minister in relation to this matter.

No description of consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. However, section 18 provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ESs for these instruments provide no information in relation to consultation.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.

The committee requests the advice of the minister in relation to this matter; and requests that the ESs be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

Drafting

The committee notes that these instruments are identified as made under section 4 of the Utilities and Services Ordinance 1996. Section 4 enables the Administrator to impose on a person a fee in relation to the provision, by the Administrator, of a utility to the person; or the use, by the person, of a service provided by the Administrator; being the fee determined by the Administrator, from time to time, to be the fee applicable to the utility or service.

However, while the instruments appear to have been made by the Administrator, the ESs to the instruments state:

> The Governor-General has made this Determination in accordance with the power granted to him under section 4 of the *Utilities and Services Ordinance 1996.*

The committee requests the advice of the minister in relation to this matter.

Instrument	**Comptroller-General of Customs Instrument of Approval No. 2 of 2015 [F2015L01501]** **Comptroller-General of Customs Instrument of Approval No. 12 of 2015 [F2015L01541]** **Comptroller-General of Customs Instrument of Approval No. 14 of 2015 [F2015L01529]** **Comptroller-General of Customs Instrument of Approval No. 15 of 2015 [F2015L01532]**
Purpose	The instruments address the effect of sunsetting under section 50 of the *Legislative Instruments Act 2003* and maintain the collection of information in accordance with a requirement under subsections 71AAAF(1) and 71L(1) of the *Customs Act 1901*
Last day to disallow	3 December 2015
Authorising legislation	*Customs Act 1901*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that various items of these Instruments of Approval refer to *'UN/LOCODE'* which is defined at the conclusion of each instrument as 'the code that applies to the place as published by the United Nations Economic Commission for Europe'. Items in these instruments also refer to the '*ISO Country Code*' which is defined, in relation to a country, as 'the code for that country as set out in ISO 3166‑1: 1997 *Codes for the representation of names of countries and their subdivisions* ‑ Part 1: Country codes (as published by the International Organization for Standardization)'.

Instrument of Approval No. 14 also refers to '*ISO Currency Code*' which is defined, in relation to a currency, as 'the code for that currency as set out in ISO 4217: 2001 *Codes for the representation of currencies and funds* (as published by the International Organization for Standardization)'. In two of the instruments (Approval Nos. 2 and 12) the '*ISO Country Code*' is incorporated 'as in force when this instrument commences'; however, in relation to the '*UN/LOCODE*' and the '*ISO Country Code*' in the remaining two instruments, neither the text of the instruments nor the ESs expressly state the manner in which the codes in question are incorporated.

The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee requests the advice of the minister in relation to this matter.

Instrument	**AASB 132 - Financial Instruments: Presentation - August 2015 [F2015L01605]**
Purpose	Reissues accounting standards for financial instruments and replaces previous versions of the standard
Last day to disallow	3 December 2015
Authorising legislation	*Corporations Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Incorporation by reference[1]

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that various items of this instrument refer to other accounting standards. For example, the instrument states:

> Australian Accounting Standard AASB 132 *Financial Instruments: Presentation* is set out in paragraphs 1 – Aus100.2 and the Appendix. All the paragraphs have equal authority. Paragraphs in bold type state the main principles. AASB 132 is to be read in the context of other Australian

1 The committee notes that the issue raised also applies to a number of recent standards including: AASB 12 - Disclosure of Interests in Other Entities - August 2015 [F2015L01536]; AASB 107 - Statement of Cash Flows - August 2015 [F2015L01538]; AASB 108 - Accounting Policies, Changes in Accounting Estimates and Errors - August 2015 [F2015L01565]; AASB 117 - Leases - August 2015 [F2015L01562]; AASB 128 - Investments in Associates and Joint Ventures - August 2015 [F2015L01543]; AASB 127 - Separate Financial Statements - August 2015 [F2015L01544]; AASB 129 - Financial Reporting in Hyperinflationary Economies - August 2015 [F2015L01550]; AASB 110 - Events after the Reporting Period - August 2015 [F2015L01553]; AASB 134 - Interim Financial Reporting - August 2015 [F2015L01557]; AASB 138 - Intangible Assets - August 2015 [F2015L01558]; AASB 116 - Property, Plant and Equipment - August 2015 [F2015L01572] ;AASB 120 - Accounting for Government Grants and Disclosure of Government Assistance - August 2015 [F2015L01576];AASB 121 - The Effects of Changes in Foreign Exchange Rates - August 2015 [F2015L01580]; AASB 123 - Borrowing Costs - August 2015 [F2015L01586]; AASB 3 - Business Combinations - August 2015 [F2015L01592]; AASB 112 - Income Taxes - August 2015 [F2015L01601]; AASB 2 - Share-based Payment - July 2015 [F2015L01603]; AASB 132 - Financial Instruments: Presentation - August 2015 [F2015L01605]; AASB 8 - Operating Segments - August 2015 [F2015L01606]; AASB 137 - Provisions, Contingent Liabilities and Contingent Assets - August 2015 [F2015L01607]; AASB 6 - Exploration for and Evaluation of Mineral Resources - August 2015 [F2015L01608]; AASB 139 - Financial Instruments: Recognition and Measurement - August 2015 [F2015L01609]; AASB 7 - Financial Instruments: Disclosures - August 2015 [F2015L01610]; AASB 140 - Investment Property - August 2015 [F2015L01611]; AASB 119 - Employee Benefits - August 2015 [F2015L01612]; AASB 13 - Fair Value Measurement - August 2015 [F2015L01613]; AASB 5 - Non-current Assets Held for Sale and Discontinued Operations - August 2015 [F2015L01614]; AASB 141 - Agriculture - August 2015 [F2015L01615]; AASB 133 - Earnings per Share - August 2015 [F2015L01616]; AASB 10 - Consolidated Financial Statements - July 2015 [F2015L01617]; AASB 124 - Related Party Disclosures - July 2015 [F2015L01621]; AASB 136 - Impairment of Assets - August 2015 [F2015L01622]; AASB 4 - Insurance Contracts - August 2015 [F2015L01623]; AASB 102 - Inventories - July 2015 [F2015L01624]; AASB 101 - Presentation of Financial Statements - July 2015 [F2015L01626]; AASB 11 - Joint Arrangements - July 2015 [F2015L01627]; AASB 1 - First-time Adoption of Australian Accounting Standards - July 2015 [F2015L01628]; AASB 1048 - Interpretation of Standards - August 2015 [F2015L01618]; and AASB 1057 - Application of Australian Accounting Standards - July 2015 [F2015L01620].

> Accounting Standards, including AASB 1048 *Interpretation of Standards*, which identifies the Australian Accounting Interpretations, and AASB 1057 *Application of Australian Accounting Standards*. In the absence of explicit guidance, AASB 108 A*ccounting Policies, Changes in Accounting Estimates and Errors* provides a basis for selecting and applying accounting policies.

However, neither the text of the instrument nor the ES expressly state the manner in which the accounting standards referred to are incorporated.

The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee requests the advice of the minister in relation to this matter.

Instrument	**Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475]**
Purpose	Repeals and replaces the Legislative Instruments Regulations 2004 to implement part of the reforms made by the *Acts and Instruments (Framework Reform) Act 2015*
Last day to disallow	3 December 2015
Authorising legislation	*Legislative Instruments Act 2003*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)

Exemption of instruments from disallowance

The regulation repeals and replaces the Legislative Instruments Regulations 2004, which currently set out exemptions from legislative instrument status, disallowance by the Parliament and sunsetting for particular instruments and classses of instrument. The ES explains that the remaking of the regulation is required to implement some of the changes introduced by the *Acts and Instruments (Framework Reform) Act 2015* (to commence in 2016).

Sections 9 and 10 of the regulation prescribe particular instruments and classes of instrument that are not subject to disallowance. In relation to section 10, the ES states:

> These particular instruments were prescribed as exempt from disallowance in section 44 of the Legislative Instruments Act and Schedule 2 of the Legislative Instruments Regulations. They have been consolidated into the

> Legislation (Exemption and Other Matters) Regulation in order to improve the accessibility of the law by providing a consolidated list of exemptions. The amendments which have been made clarify the exemptions, modify or consolidate exemptions where there was overlap between the exemptions in the Legislative Instruments Act and the Legislative Instruments Regulations, and update exemptions to ensure they reflect existing in practice.

The item-by-item description of section 10 in the ES provides justifications for the exemption of particular instruments from disallowance, explaining why the particular nature of the instruments justifies the exemption from disallowance. The exception is item 20 of the table in section 10, which remakes item 26 of the table in subsection 44(2) of the *Legislative Instruments Act 2003*. This item exempts the following from disallowance:

- an instrument (other than a regulation) made under Part 1, 2 or 9 of the *Migration Act 1958*, and
- an instrument made under Part 1, 2 or 5 of, or Schedule 1, 2, 4, 5A or 8 to, the *Migration Regulations 1994*.

The committee notes that this exemption extends to a large number of instruments relating to a broad range of matters, including the conditions pertaining to the arrival, presence and departure of persons in Australia; labour market testing; and the designation of a country as a 'regional processing country'. However, the ES simply states that the 'instruments made under the Migration Act and Migration Regulations are appropriate for executive control', and does not provide information on:

- the nature of the instruments covered by the exemption;
- the broader justification for the exemption of instruments made under the Migration Act and Migration Regulations; and
- whether, taking into account the nature of the instruments to which the exemption applies, it is appropriate to include this broad exemption from disallowance (thereby removing them from the effective oversight of the Parliament).

The committee requests the advice of the minister in relation to this matter.

Instrument	**Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015 [F2015L01461]**
Purpose	Amends the Migration Regulations 1994 to confirm that the effect of section 2.08F is to provide that any application made by certain visa applicants for a Permanent Protection Visa will be converted into an application for a Temporary Protection Visa
Last day to disallow	3 December 2015
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(b)

Retrospective effect

The regulation amends section 2.08F of the Migration Regulations 1994, and is intended to confirm that the effect of that section is to provide that an application for a Permanent Protection Visa (PPV) will be converted into an application for a Temporary Protection Visa (TPV) if the application:

- has been the subject of a court order requiring the minister to reconsider the application;
- has been remitted to the minister for reconsideration by the Administrative Appeals Tribunal; or
- had not been decided by the minister before 16 December 2014.

The committee notes that, although the instrument is not strictly retrospective, it prescribes rules for the future based on antecedent facts (that is, the existence of an earlier visa application). As a consequence, it appears that a person whose application for a PPV was made on or before 16 December 2014 may now be subject to criteria for the grant of a TPV that did not apply at the time of their application.

The ES for the instrument states:

> It is noted that the Regulation does not have any retrospective effect beyond the retrospectivity expressly authorised by the Migration Act (subsection 45AA(3) and subsection 45AA(8)) and reflected in subregulation 2.08F(1) (which has not been amended). The effect of the conversion from a PPV application to a TPV application is that the visa application is taken not to be, and never to have been, a valid application for a PPV, and is taken to be, and to always have been, a valid application for a TPV.

The committee notes that subsection 45AA(3) of the *Migration Act 1958* (the Act) specifically provides that a regulation may provide that, where a visa class is changed

or effectively superseded (as in this case), an earlier application for the visa is taken not to be, and never to have been, a valid application for the visa; and is taken to be, and always to have been, a valid application for the amended or new visa. The Act also provides that, to avoid doubt, subsection 12(2) of the *Legislative Instruments Act 2003* and subsection 7(2) of the *Acts Interpretation Act 1901* do not apply to any such regulation (subsection 45AA(8)).[2]

However, the committee's usual approach in cases such as this, is to regard the instruments as being retrospective in effect, and to asses such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)).

The committee requests the advice of the minister in relation to this matter.

Instrument	**Removal of Prisoners (Territories) Regulation 2015 [F2015L01524]**
Purpose	Repeals and re-makes the Removal of Prisoners (Territories) Regulations in the same form; and continues an administrative process that allows prisoners to make an application to the secretary of the Commonwealth department with administrative responsibility for the territories to return to a territory after the expiration of their custodial sentence, at no cost to themselves
Last day to disallow	3 December 2015
Authorising legislation	*Removal of Prisoners (Territories) Act 1923*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

No description of consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. However, section 18 provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken

2 In general terms, these provisions respectively provide that an instrument may not commence retrospectively where a person other than the Commonwealth would be disadvantaged; and that the amendment of an Act or part of an Act does not affect the previous operation of those provisions (including any right, privilege, obligation or liability acquired, accrued or incurred under the affected provisions).

(section 26). With reference to these requirements, the committee notes that the ES for this instrument provides no information in relation to consultation.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.

The committee requests the advice of the minister in relation to this matter; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

Instrument	**Safety, Rehabilitation and Compensation (Definition of Employee) Amendment Notice 2015 [F2015L01665]**
Purpose	Amends the Commonwealth Employees' Rehabilitation and Compensation Act 1988 – Notice of Declarations and Specifications (Notice No. 1 of 1990) to substitute reference to the 'Australian National Gallery' with the 'National Gallery of Australia' and corrects a typographical error in the the Safety, Rehabilitation and Compensation Act 1988 – Notice of Declaration under subsection 5(6) (Notice No. V1 of 1995)
Last day to disallow	22 February 2016
Authorising legislation	*Safety, Rehabilitation and Compensation Act 1988*
Department	Employment
Scrutiny principle	Standing Order 23(3)(a)

No description of consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. However, section 18 provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for this instrument provides no information in relation to consultation.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.

The committee requests the advice of the minister in relation to this matter; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

Advice only

The committee draws the following matters to the attention of relevant ministers or instrument-makers on an advice only basis. These comments do not require a response.

Multiple instruments that appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*

Instruments	A New Tax System (Goods and Services Tax) Act 1999 Simplified GST Accounting Methods Determination (No. 28) 2015 [F2015L01578]
	A New Tax System (Goods and Services Tax) Act 1999 Simplified GST Accounting Method Determination (No. 29) 2015 [F2015L01587]
	A New Tax System (Goods and Services Tax) Act 1999 Telecommunication Supplies Determination (No. 38) 2015 [F2015L01574]
	AASB 1 - First-time Adoption of Australian Accounting Standards - July 2015 [F2015L01628]
	AASB 10 - Consolidated Financial Statements - July 2015 [F2015L01617]
	AASB 101 - Presentation of Financial Statements - July 2015 [F2015L01626]
	AASB 102 - Inventories - July 2015 [F2015L01624]
	AASB 107 - Statement of Cash Flows - August 2015 [F2015L01538]
	AASB 108 - Accounting Policies, Changes in Accounting Estimates and Errors - August 2015 [F2015L01565]
	AASB 11 - Joint Arrangements - July 2015 [F2015L01627]
	AASB 110 - Events after the Reporting Period - August 2015 [F2015L01553]
	AASB 116 - Property, Plant and Equipment - August 2015 [F2015L01572]
	AASB 117 - Leases - August 2015 [F2015L01562]

	AASB 119 - Employee Benefits - August 2015 [F2015L01612]
	AASB 12 - Disclosure of Interests in Other Entities - August 2015 [F2015L01536]
	AASB 120 - Accounting for Government Grants and Disclosure of Government Assistance - August 2015 [F2015L01576]
	AASB 121 - The Effects of Changes in Foreign Exchange Rates - August 2015 [F2015L01580]
	AASB 123 - Borrowing Costs - August 2015 [F2015L01586]
	AASB 124 - Related Party Disclosures - July 2015 [F2015L01621]
	AASB 127 - Separate Financial Statements - August 2015 [F2015L01544]
	AASB 128 - Investments in Associates and Joint Ventures - August 2015 [F2015L01543]
	AASB 129 - Financial Reporting in Hyperinflationary Economies - August 2015 [F2015L01550]
	AASB 13 - Fair Value Measurement - August 2015 [F2015L01613]
	AASB 132 - Financial Instruments: Presentation - August 2015 [F2015L01605]
	AASB 133 - Earnings per Share - August 2015 [F2015L01616]
	AASB 134 - Interim Financial Reporting - August 2015 [F2015L01557]
	AASB 136 - Impairment of Assets - August 2015 [F2015L01622]
	AASB 137 - Provisions, Contingent Liabilities and Contingent Assets - August 2015 [F2015L01607]
	AASB 138 - Intangible Assets - August 2015 [F2015L01558]
	AASB 139 - Financial Instruments: Recognition and Measurement - August 2015 [F2015L01609]
	AASB 140 - Investment Property - August 2015 [F2015L01611]

	AASB 141 - Agriculture - August 2015 [F2015L01615]
	AASB 2 - Share-based Payment - July 2015 [F2015L01603]
	AASB 3 - Business Combinations - August 2015 [F2015L01592]
	AASB 112 - Income Taxes - August 2015 [F2015L01601]
	AASB 4 - Insurance Contracts - August 2015 [F2015L01623]
	AASB 5 - Non-current Assets Held for Sale and Discontinued Operations - August 2015 [F2015L01614]
	AASB 6 - Exploration for and Evaluation of Mineral Resources - August 2015 [F2015L01608]
	AASB 7 - Financial Instruments: Disclosures - August 2015 [F2015L01610]
	AASB 8 - Operating Segments - August 2015 [F2015L01606]
	ASIC Corporations (Repeal) Instrument 2015/846 [F2015L01559]
	ASIC Corporations (Repeal) Instrument 2015/859 [F2015L01531]
	Australian Maritime Safety Authority Fees Determination 2015 [F2015L01477]
	Australian Passports (Application Fees) Amendment Determination 2015 (No.1) [F2015L01629]
	CASA EX166/15 - Exemption — operations without an approved digital flight data recorder [F2015L01585]
	Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) [F2015L01673]
	Christmas Island Marine Traffic and Harbour Facilities Determination 2015 [F2015L01591]
	Defence (Prohibited Substances) Determination 2015 [F2015L01522]
	Goods and Services Tax: Application of Intermediary Arrangements to the Multi-Media Industry Determination (No. 33) 2015 [F2015L01579]

	Goods and Services Tax: Choosing to Account on a Cash Basis Determination (No 39) 2015 - representatives of incapacitated entities [F2015L01570]
	Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination (No. 24) 2015 [F2015L01581]
	Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination (No. 20) 2015 [F2015L01560]
	Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination (No.21) 2015 [F2015L01563]
	Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination (No. 27) 2015 [F2015L01564]
	Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination (No.22) 2015 [F2015L01566]
	Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination (No. 14) 2015 [F2015L01567]
	Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination (No. 25) 2015 [F2015L01568]
	Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination (No. 23) 2015 [F2015L01571]
	Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination (No. 26) 2015 [F2015L01573]
	Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination (No. 15) 2015 [F2015L01588]
	Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination (No. 17) 2015 [F2015L01594]
	Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination (No. 18) 2015 [F2015L01596]
	Goods and Services Tax: Classes of Recipient Created Tax Invoice Determination (No. 19) 2015 [F2015L01597]
	Goods and Services Tax: Extension of Time to Issue An Adjustment Note Determination (No. 37) 2015 - Supplies made by electricity distributors to electricity retailers [F2015L01577]

	Goods and Services Tax: Extension of Time to Issue An Adjustment Note Determination (No. 36) 2015 [F2015L01582]
	Goods and Services Tax: Extension of Time to Issue An Adjustment Note Determination (No. 35) 2015 [F2015L01589]
	Goods and Services Tax: Margin Scheme Valuation Requirements Determination MSV (No 53) 2015 [F2015L01584]
	Goods and Services Tax: Particular Attribution Rules for supplies and acquisitions relating to the operation of a Collecting Society under the Copyright Act Determination (No. 34) 2015 [F2015L01583]
	Goods and Services Tax: Rules for Applying Subdivision 66-B Determination (No. 31) 2015 [F2015L01575]
	Goods and Services Tax: Waiver of Tax Invoice Requirement Determination (No. 30) 2015 [F2015L01569]
	GST-free Supply (Drugs and Medicinal Preparations) Determination 2015 [F2015L01466]
	Health Insurance (Midwife and Nurse Practitioner) Determination 2015 [F2015L01660]
	National Greenhouse and Energy Reporting (Audit) Amendment Determination 2015 (No. 1) [F2015L01638]
	Passports Legislation Amendment (2015 Measures No. 1) Determination 2015 [F2015L01630]
	Private Health Insurance (Benefit Requirements) Amendment Rules 2015 (No. 4) [F2015L01451]
	Private Health Insurance (Complying Product) Amendment Rules 2015 (No. 3) [F2015L01449]
	Radiocommunications (Spectrum Access Charges — 3.4 GHz Band) Determination 2015 (No. 2) [F2015L01659]
	Remuneration Tribunal Determination 2015/14 - Remuneration and Allowances for Holders of Public Office [F2015L01523]
	Social Security (Administration) (Declared voluntary income management areas – New South Wales, Queensland, South Australia and Victoria) Amendment Determination 2015 [F2015L01511]

	Telecommunications (Interception and Access) (Requirements for Authorisations, Notifications and Revocations) Determination 2015 [F2015L01648] Therapeutic Goods (Listing) Notice 2015 (No. 6) [F2015L01640] Veterans' Entitlements (Special Disability Trust Beneficiary Requirements) Nomination of Agreement Instrument 2015 [F2015L01649]
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The instruments identified above appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, the committee considers it would be preferable for the ES for any such instrument to identify the relevance of subsection 33(3), in the interests of promoting the clarity and intelligibility of the instrument to anticipated users. **The committee provides the following example of a form of words which may be included in an ES where subsection 33(3) of the *Acts Interpretation Act 1901* is relevant:**

> Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[3]

3 For more extensive comment on this issue, see *Delegated legislation monitor* No. 8 of 2013, p. 511.

Chapter 2
Concluded matters

This chapter sets out matters which have been concluded to the satisfaction of the committee based on responses received from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 1.

Instrument	**Carbon Credits (Carbon Farming Initiative—Beef Cattle Herd Management) Methodology Determination 2015 [F2015L01434]**
Purpose	Sets the rules for implementing and monitoring offsets projects that would reduce emissions of greenhouse gases from grazing beef cattle through improvement in production efficiency of beef cattle herds
Last day to disallow	2 December 2015
Authorising legislation	*Carbon Credits (Carbon Farming Initiative) Act 2011*
Department	Environment
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 12 of 2015

Incorporation of extrinsic material

The committee commented as follows:

This instrument provides for crediting emissions reductions from projects that improve the production efficiency of pasture-fed beef cattle herds.

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

Subsection 106(8) of the authorising legislation for the instrument (the *Carbon Credits (Carbon Farming Initiative) Act 2011*) provides that instruments may apply, adopt or incorporate (with or without modifications) matter contained in any other instrument or writing 'as in force or existing at a particular time' or 'as in force or existing from time to time' (thereby altering the effect of section 14 of the *Legislative Instruments Act 2003*).

With reference to the above, the committee notes that subsection 5(1) of the instrument refers to the Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006; and note 1 to subsection 25(1) of the instrument refers to Accounting Standard AASB 141—Agriculture. However, neither the instrument nor the explanatory statement (ES) expressly state the manner in which the specified documents are incorporated.

The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee requests the advice of the minister in relation to this matter.

Minister's response

The Minister for the Environment advised:

> The references to ANZSIC 2006 are to the 2006 publication of that classification and are not intended to include any reclassification of the relevant ANZSIC classes from time to time. Categories defined by ANZSIC 2006 are straight forward and readily available. These categories provide a simple way to define an eligible project herd. The reliance on the 2006 publication is clear from section 15 of the Determination, which includes the detail of the three ANZSIC classes that are eligible to use the Determination and a note which lists the ANZSIC class that is not eligible. Those references would not function effectively if the ANZSIC classes were intended to vary over time and not be limited to the 2006 publication.
>
> Reference is made to Accounting Standard AASB I 41-Agriculture in a note to section 25 of the Determination because it is widely used in the agriculture sector and can be used for the purpose described in the Determination. However, it is not a requirement of the Determination that AASB 141-Agriculture must be used. The intention is to indicate to users of the Determination that reference to AASB 141-Agriculture may assist meeting the requirements of the Determination. Other accounting standards could also be suitable for use for this purpose.
>
> It is anticipated that, for the purpose of the note, both AASB 141-Agriculture and any update to that standard would have the same effect. In the highly unlikely event that an update to AASB 141-Agriculture impacted the example provided in the note, the Determination could be varied to clarify this. Accordingly, the note is primarily based on the current standard, but is anticipated to be equally applicable to any variation of that standard over time.
>
> Further detail on the use of standards to assist in meeting the requirements of the Determination is explained in the paragraphs of the Explanatory Statement to the Determination dealing with section 30.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

Instrument	**Fair Work (Building Industry) Regulation 2015 [F2015L01399]**
Purpose	Repeals and replaces the Fair Work (Building Industry) Regulations 2005, which prescribe matters that support the operation of the *Fair Work (Building Industry) Act 2012*
Last day to disallow	23 November 2015
Authorising legislation	*Fair Work (Building Industry) Act 2012*
Department	Employment
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 12 of 2015

Sub-delegation

The committee commented as follows:

Section 6 of this instrument provides that the Federal Safety Commissioner may delegate his or her powers under the *Fair Work (Building Industry) Act 2012* to an Australian Public Service (APS) employee who is engaged for the purposes of the Office of the Federal Safety Commissioner.

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

In this respect, the ES for the instrument provides no justification for the broad delegation of the Federal Safety Commissioner's powers to 'an APS employee who is engaged for the purposes of the Office of the Federal Safety Commissioner', other than to state briefly that this will 'support the effective administration of the Accreditation Scheme'.

The committee requests the advice of the minister in relation to this matter.

Minister's response

The Minister for Employment advised:

> [T]he Explanatory Statement makes it clear that the Commissioner's ability to delegate his or her powers and functions is in fact limited to a specific category of persons, namely Australian Public Service employees who are engaged for the purposes of the Office of the Federal Safety Commissioner. This limitation is directed at ensuring that only persons with appropriate knowledge and experience can have powers or functions delegated to them. In addition, section 32 of the *Fair Work (Building Industry) Act 2012* requires delegates to comply with any directions of the Federal Safety Commissioner in exercising powers or functions under delegation.
>
> Further, in relation to the Committee's view that delegates should be confined to the holders of nominated offices or to members of the Senior Executive Service (SES), I note that the position of Federal Safety Commissioner is occupied by a SES Level 1 employee. Accordingly, no other SES employees are engaged for the purposes of the Office of the Federal Safety Commissioner.
>
> In this context, restricting delegations in accordance with the Committee's view is likely to hamper the effective and efficient carrying out of the Federal Safety Commissioner's functions, including the administration of the Accreditation Scheme (for persons wishing to carry out Commonwealth building work).

Committee's response

The committee thanks the minister for her response and has concluded its examination of the instrument.

Instrument	**Migration Amendment (Visa Labels) Regulation 2015 [F2015L01304]**
Purpose	Amends the Migration Regulations 1994 to remove prescribed forms of evidence of a visa
Last day to disallow	12 November 2015
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 10 of 2015

Consultation

The committee commented as follows:

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have

an effect on business. However, section 18 provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument states:

> The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulation. The OBPR advises that the changes do not have a regulatory impact on business or the not-for-profit sector. The OBPR consultation reference is 18021.

The committee's guideline on the requirement to address the question of consultation under the *Legislative Instruments Act 2003* states:

> It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the [*Legislative Instruments Act 2003*]…in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met.

The committee notes that the ES for the instrument provides no information regarding consultation for the purposes of the *Legislative Instruments Act 2003*.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.

The committee requests the advice of the minister in relation to this matter; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

Minister's response

The Minister for Immigration and Border Protection advised:

> …external consultations on the measures in this instrument were undertaken. Consultations were conducted with Service Delivery Partners, Australian State and Territory government agencies and other Australian Commonwealth government agencies. These stakeholders were in support of the label reduction strategy. Further, affected foreign governments were consulted through Depatiment of Foreign Affairs and Trade; these amendments only affect a small cohort of travellers and alternative arrangements are available where required. The amendment is consistent with the Government's Deregulation and Digital strategies and completes Australia's long standing visa label reduction strategy.

Further, the minister provided a revised ES that had been amended to include the information provided.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

Instrument	**Military Rehabilitation and Compensation Act Education and Training Scheme 2004 [F2015L01281]** **Veterans' Children Education Scheme [F2015L01280]**
Purpose	These instruments set out the education allowances and other related benefits available to the children of specified members of the Defence Force and the children of specified veterans
Last day to disallow	9 November 2015
Authorising legislation	*Military Rehabilitation and Compensation Act 2004*; *Veterans' Entitlements Act 1986*
Department	Veterans' Affairs
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 10 of 2015

Sub-delegation

The committee commented as follows:

Section 8.1.2 of the first instrument provides that the Military Rehabilitation and Compensation Commission may delegate any of its powers under the Military Rehabilitation and Compensation Act Education and Training Scheme (the scheme) to an employee of the Department of Veterans' Affairs.

Section 8.1.2 of the second instrument provides that the Repatriation Commission may delegate any of its powers under the Veterans' Children Education Scheme to an employee or officer of the Australian Public Service.

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

In this respect, the ES for the instrument provides no justification for the broad delegation of the Commission's powers under the Scheme to any employee or officer of the Australian Public Service.

The committee requests the advice of the minister in relation to this matter.

Minister's response

The Minister for Veterans' Affairs advised:

Although paragraph 8.1.2 is expressed in broad terms, nevertheless delegations of Commission powers under the VCES and MRCAETS are made in separate instruments that are approved by the Commissions. Accordingly there is high level scrutiny of the types of powers being delegated and of the people who can exercise those powers.

Further, the level of complexity of the decision making is low. The delegate is exercising their power in prescribed circumstances that are already detailed in the relevant legislation. In simple terms, the delegate is determining eligibility against prescribed criteria and rates of payment.

I am advised by DVA that although most decisions under the Schemes are made below the SES level, decisions on complex cases under the VCES or MRCAETS are made by Band 1 or 2 SES officers who hold the necessary delegations.

Therefore, I am confident that there is a sufficient safeguard for ensuring that only appropriate delegations will be made and that the powers being delegated are clearly defined through other legislation. I further note that circumscribing the delegation-power could limit the flexibility of the Commissions.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

Instrument	**Taxation Administration Act 1953 - Pay as you go withholding - PAYG Withholding Variation: Allowances – Legislative Instrument [F2015L01047]**
Purpose	Repeals the Taxation Administration Act 1953 - PAYG Withholding - PAYG Withholding Variation: Allowances; and adjusts the cents per kilometre car expense payments
Last day to disallow	1 December 2015
Authorising legislation	*Taxation Administration Act 1953*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 8 and 12 of 2015

Drafting

The committee commented as follows:

This instrument effects certain changes to tax arrangements, and appears to apply from 1 July 2015. The ES for the instrument states:

> The variation for cents per kilometre car expense payments has been adjusted because of a proposed change to calculation rules announced in the federal budget on 12 May 2015. If passed, the change is to take effect from 1 July 2015.

The committee understands this statement to mean that the measure will subsequently be confirmed by primary legislation. If this is correct, it is unclear to the committee how the instrument operates in the period prior to the passage of the primary legislation, and in the event that measure is not ultimately confirmed by primary legislation.

The committee requested the advice of the Treasurer on this matter.

The Treasurer's first response

The former Treasurer advised:

> Section 15-15 of *Taxation Administration Act 1953* gives the Commissioner the discretion to vary the amounts withheld (including to nil) for a class of taxpayers to meet the special circumstances of that class. It has been long standing Australian Taxation Office practice to vary to nil the withholding rates for allowances subject to exceptions under the substantiation rules for employees claiming deductions.
>
> In exercising the discretion under section 15-15, the Commissioner takes into account whether the final tax liability on the allowance will not accord with the withholding schedule rate.
>
> Employers are able to pay car allowances at a rate that is less than or greater than the cents per kilometre rate. The effect of the variation is that if the rate of allowance paid exceeds 66 cents per kilometre, the employer is required to withhold at the scheduled rates. The employee will need to declare the amount of the allowance and can also claim a deduction for expenses incurred. If the employee claims an amount in their tax return equal to or less than the statutory cents per kilometre rates substantiation is not required.

Committee's first response

The committee thanks the former Treasurer for his response.

The committee notes the former Treasurer's advice as to the effect of the instrument prior to the passage of confirming primary legislation. However, it remains unclear to the committee as to whether the instrument would continue to operate in the event that the measure is not ultimately confirmed by primary legislation.

The committee therefore seeks further advice from the Treasurer in relation to this matter.

Treasurer's second response

The Treasurer advised:

> The legislative instrument provides that from 1 July 2015 there is no requirement for a payer to withhold tax cents per kilometre car allowances where the payment amount does not exceed an approved rate. The approved

> rate has been set at 66 cents per kilometre. This was based on the 2015 Federal Budget announcement to modernise the methods used for calculating work-related car expense deductions. Part of the changes amends the three rates based on engine capacity (currently 77 cents, 76 cents and 65 cents) to one (66 cents) from 1 July 2015.
>
> The primary legislation to give effect to the Budget announcement is currently in the lower house as Schedule 1 to Tax and Superannuation Laws Amendment (2015 Measures No. 5) Bill 2015.

The Treasurer also provided the following advice as to how the instrument would operate in the event that the measure is not ultimately confirmed by primary legislation:

> The following information is provided to address these circumstances, assuming that this outcome is known by the end of the 2016 income year, given the measure is intended to commence on 1 July 2015:
>
> - In their 2016 tax return, employees will be entitled to claim deductions according to the engine size of their car and use the three rates based on engine capacity.
> - Noting that employers are free to pay allowances that are less than or more than the approved cents per kilometre rate, if the allowance was paid at the 66 cent rate, employees with larger engines may be able to claim a larger deduction at the rate of 77 cents or 76 cents per kilometre.
> - If the engine size of the car means the deduction for car expenses should be 65 cents per kilometre, and the employee was paid an allowance at a higher rate, the employee's available deduction (if they cannot fully substantiate expenses) will be limited to the 65 cents rate.
> - The legislative instrument, if not disallowed, will continue to operate as it does not refer to a specific rate. When it is known that the legislation will not proceed, the approved rate would be amended to reflect the three rates based on engine capacity.
> - For allowances paid after the amendment, a payer would not be required to withhold from a car allowance where the payment amount does not exceed these three approved rates.

Further, the Treasurer noted that the ATO would assist employees to correctly complete their tax returns, explaining 'how to include the car allowance as income and at what rate a deduction for the work-related car expenses can be claimed without substantiation'.

Committee's second response

The committee thanks the Treasurer for his response and has concluded its examination of the instrument.

Appendix 1
Correspondence

The Hon Greg Hunt MP

Minister for the Environment

MC15-039139

27 OCT 2015

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator John

I refer to your letter of 13 October 2015 seeking advice in relation to the incorporation of documents by reference under the *Carbon Credits (Carbon Farming Initiative—Beef Cattle Herd Management) Methodology Determination 2015* (the Determination).

In its *Delegated Legislation Monitor No. 11 of 2015* (the Monitor No. 11), the Committee notes that subsection 106(8) of the authorising legislation for the Determination (the *Carbon Credits (Carbon Farming Initiative) Act 2011*) provides that determinations made under this Act may apply, adopt or incorporate (with or without modifications) matters contained in any other instrument or writing 'as in force or existing at a particular time' or 'as in force or existing from time to time'.

The Monitor No. 11 also notes that subsection 5(1) of the instrument refers to the Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006; and note 1 to subsection 25(1) of the instrument refers to Accounting Standard AASB 141-*Agriculture*. However, neither the instrument nor the explanatory statement expressly states the manner in which the specified documents are incorporated.

The references to ANZSIC 2006 are to the 2006 publication of that classification and are not intended to include any reclassification of the relevant ANZSIC classes from time to time. Categories defined by ANZSIC 2006 are straight forward and readily available. These categories provide a simple way to define an eligible project herd. The reliance on the 2006 publication is clear from section 15 of the Determination, which includes the detail of the three ANZSIC classes that are eligible to use the Determination and a note which lists the ANZSIC class that is not eligible. Those references would not function effectively if the ANZSIC classes were intended to vary over time and not be limited to the 2006 publication.

Reference is made to Accounting Standard AASB 141-*Agriculture* in a note to section 25 of the Determination because it is widely used in the agriculture sector and can be used for the purpose described in the Determination. However, it is not a requirement of the Determination that AASB 141-*Agriculture* must be used. The intention is to indicate to users of the Determination that reference to AASB 141-*Agriculture* may assist meeting the requirements of the Determination. Other accounting standards could also be suitable for use for this purpose.

It is anticipated that, for the purpose of the note, both AASB 141-*Agriculture* and any update to that standard would have the same effect. In the highly unlikely event that an update to AASB 141-*Agriculture* impacted the example provided in the note, the Determination could be varied to clarify this. Accordingly, the note is primarily based on the current standard, but is anticipated to be equally applicable to any variation of that standard over time.

Further detail on the use of standards to assist in meeting the requirements of the Determination is explained in the paragraphs of the Explanatory Statement to the Determination dealing with section 30.

I have copied this letter to the Committee Secretary, Mr Ivan Powell.

Yours sincerely

Greg Hunt

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MC15-003613

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

***Fair Work (Building Industry) Regulation 2015* [F2015L01399]**

Thank you for the letter of 13 October 2015 from the Standing Committee on Regulations and Ordinances (the Committee) concerning the Committee's consideration of the *Fair Work (Building Industry) Regulation 2015* (the Regulation) in its *Delegated Legislation Monitor No. 12 of 2015*.

The Committee's comments refer to section 6 of the Regulation, which permits delegation of the Federal Safety Commissioner's powers and functions to an Australian Public Service employee who is engaged for the purposes of the Office of the Federal Safety Commissioner. The Committee expressed concern that the Explanatory Statement for the Regulation did not justify the apparent breadth of the delegation power.

I note that the Explanatory Statement makes it clear that the Commissioner's ability to delegate his or her powers and functions is in fact limited to a specific category of persons, namely Australian Public Service employees who are engaged for the purposes of the Office of the Federal Safety Commissioner. This limitation is directed at ensuring that only persons with appropriate knowledge and experience can have powers or functions delegated to them. In addition, section 32 of the *Fair Work (Building Industry) Act 2012* requires delegates to comply with any directions of the Federal Safety Commissioner in exercising powers or functions under delegation.

Further, in relation to the Committee's view that delegates should be confined to the holders of nominated offices or to members of the Senior Executive Service (SES), I note that the position of Federal Safety Commissioner is occupied by a SES Level 1 employee. Accordingly, no other SES employees are engaged for the purposes of the Office of the Federal Safety Commissioner. In this context, restricting delegations in accordance with the Committee's view is likely to hamper the effective and efficient carrying out of the Federal Safety Commissioner's functions, including the administration of the Accreditation Scheme (for persons wishing to carry out Commonwealth building work).

Yours sincerely

Senator the Hon Michaelia Cash
29 / 10 / 2015

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS15-023309

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator John,

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 11 September 2015 concerning the Delegated Legislation Monitor No. 10 of 2015, in which the Committee requested a response regarding the *Migration Amendment (Visa Labels) Regulation 2015*. The response in relation to this legislative instrument is attached.

I apologise for the delay in providing a response. The letter was only received by the department on 24 September 2015.

Thank you again for bringing this matter to my attention. I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 21/10/15

Attachment

Migration Amendment (Visa Labels) Regulation 2015 **[F2015L01304]**

The Committee noted that the Explanatory Statement for the Regulation did not include a description regarding consultation. The Committee has sought further information about the nature of the consultation undertaken for the Regulation and requested that the Explanatory Statement for the Regulation be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

I confirm that external consultations on the measures in this instrument were undertaken. Consultations were conducted with Service Delivery Partners, Australian State and Territory government agencies and other Australian Commonwealth government agencies. These stakeholders were in support of the label reduction strategy. Further, affected foreign governments were consulted through Department of Foreign Affairs and Trade; these amendments only affect a small cohort of travellers and alternative arrangements are available where required. The amendment is consistent with the Government's Deregulation and Digital strategies and completes Australia's long standing visa label reduction strategy.

A revised Explanatory Statement is attached and I will arrange for it to be re-tabled.

I thank you for bringing this matter to my attention.

EXPLANATORY STATEMENT

Select Legislative Instrument 2015 No.

Issued by the Minister for Immigration and Border Protection

Migration Act 1958

Migration Amendment (Visa Labels) Regulation 2015

The *Migration Act 1958* (the Migration Act) is an Act to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens and other persons.

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing all matters which by the Migration Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Migration Act.

The purpose of the *Migration Amendment (Visa Labels) Regulation 2015* (the Regulation) is to amend the *Migration Regulations 1994* (the Migration Regulations) to remove prescribed forms of evidence of a visa. The Regulation allows Australia to cease issuing all visa labels from 1 September 2015. This will complete Australia's visa label reduction strategy which aligns with the Government's ongoing shift towards promoting digital service delivery channels for public access to government services including visa information. Visa grants are recorded electronically. Therefore, visa holders are able to send details of their visa status and conditions to any third party they choose to demonstrate their authority to travel to, enter, remain, work or study, and conduct other activities in Australia.

In particular, the Regulation repeals Division 2.4 of Part 2 of the Migration Regulations which relates to prescribed evidence of visas. As a result, there are no regulations prescribed under Subdivision AE of Division 3 of Part 2 of the Migration Act.

A Statement of Compatibility with Human Rights (the Statement) has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the Regulation is compatible with human rights. A copy of the Statement is at Attachment A.

Details of the Regulation are set out in Attachment A.

The Migration Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulation. The OBPR advises that the changes do not have a regulatory impact on business or the not-for-profit sector. The OBPR consultation reference is 18021.

External consultations on the measures in this instrument involved Service Delivery Partners such as: VFS Global; TT Visa Outsourcing Limited; airlines; the Law Council of Australia; and the Migration Institute of Australia. The department consulted with Australian State and Territory government agencies such as: VicRoads; the South Australian Department of Planning, Transport and Infrastructure; and Transport for New South Wales. The department also consulted with other Australian Commonwealth government agencies such as: the Department of Foreign Affairs and Trade (DFAT); the Attorney-General's Department; the Department of Social Services; and the Department of Human Services. These stakeholders were in support of the label reduction strategy.

Further, the department consulted with foreign governments through DFAT regarding requirements of visa labels for departure or transit purposes in their countries and most accepted label-free travel to Australia. These amendments affect a very small cohort of travellers and alternative arrangements are available as required.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. The Regulation commences on 1 September 2015.

ATTACHMENT A

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Amendment (Visa Labels) Regulation 2015

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Visa Evidence Charge (VEC) introduced on 24 November 2012 is a charge imposed on a visa holder who formally requests evidence of a visa in the form of a visa label affixed to their valid travel document. However, the Australian Government does not require persons holding valid Australian visas to have a label in their passport in order to travel to, enter or remain in Australia.

Departmental systems are the preferred way of verifying a visa holder's authority to travel to, enter, remain, work or study, and conduct other activities in Australia. When a passenger checks in to fly to Australia, airline staff are required to use the passenger's passport details to electronically confirm that the passenger has the authority to travel to Australia prior to boarding the aircraft using the Advance Passenger Processing system. Visa holders are encouraged to utilise Visa Entitlement Verification Online (VEVO) which is a secure and real-time electronic system to demonstrate and confirm their visa conditions.

The VEC supports the department's visa label reduction strategy by discouraging requests for visa labels by visa holders. The department has achieved its visa label reduction target (95% reduction in demand when compared with 2011 data) and is now in a position to cease all visa label issuance in 2015 pending changes to the Migration Regulations to remove Division 2.4 of Part 2 which covers the following provisions:

- regulation 2.17 specifies the type of evidence that is required;
- regulation 2.18 provides for the way of making a request for evidence of a visa;
- regulation 2.19 provides for the places for lodging a request for evidence of a visa;
- regulation 2.19A provides for the amount of the visa evidence charge;
- regulation 2.19B provides for a circumstance in which a prescribed form of evidence of a visa may be requested; and
- regulation 2.19C provides for refund of the visa evidence charge.

The department has undertaken extensive stakeholder engagement over the last three years regarding the global rollout of visa label free arrangements and the introduction of the VEC. The initiative is generally well understood and accepted by stakeholders, including foreign governments.

Regulatory savings have been forecast following cessation of issuing visa labels. Having to obtain a visa label can result in unnecessary expense, delays and inconvenience for clients and third party stakeholders. The amendments to the *Migration Regulations 1958* (the Migration Regulations) allow Australia to cease issuing all visa labels from 1 September 2015. Removing Division 2.4 of Part 2 of the Migration Regulations would remove the remaining requirement to provide visa labels, as there would be no prescribed form of evidence under the following provisions:

- subsection 70(1) (which allows persons to request to be given a prescribed form of evidence); and
- section 71A (which requires an officer to give a requesting person a prescribed form of evidence provided the visa evidence charge has been paid).

Human rights implications

The department has considered the amendments against the seven core international human rights treaties to which Australia is a party. It is considered that the Legislative Instrument engages Article 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Article 2 of ICCPR provides that:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." (emphasis added)

Article 26 of ICCPR provides that:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status." (emphasis added)

Article 2 provides that for a person to fall within the scope of the ICCPR, they must be within "Australia's territory" or within its "jurisdiction". Where a person is outside Australia's territory and jurisdiction, Article 2 is not engaged for the purposes of the amendments. As all visa holders within Australia will be unable to receive a visa label but will have access to the same alternative forms of evidence (such as VEVO – see below), regardless of nationality, there is no breach of Article 2.

Article 26 contains a general prohibition on "discrimination" and further contains a "guarantee" to have equal and effective protection against discrimination on any ground including "national" origin. In relation to ceasing issuing the visa labels, the policy intent is to make the cessation consistent for nationals from all countries, therefore is non-discriminatory in application.

However, the proposal to cease issuing visa labels may impact on non-citizens from different countries in different ways and may impact on non-citizens who require visa labels for departure or transit purposes. All but a few foreign countries now formally accept label-free travel to Australia. The cohort affected by this lack of agreement is very small. Border

clearance processes are already in place to manage this cohort. This differential impact occurs as a result of the application of the migration laws of the foreign countries and not as a result of this proposed amendment. Therefore Article 26 is also not breached by this amendment.

Digital options are available for visa holders should they need to demonstrate their visa status and type to foreign governments for purposes such as: entry/transit; exit; and visa requirements. VEVO allows visa holders to check and send details about their visa status directly from the VEVO system to any email addresses. Visa holders can also retrieve their visa details from VEVO (existing web service) on a mobile electronic device and show this information to foreign officials. The department released the myVEVO mobile app in June 2015 making it even easier for visa holders to source their visa details using their smartphone.

Whilst the amendments engage Article 2 and 26 of the ICCPR, the amendments are consistent with those Articles, and therefore do not raise any human rights issues.

Conclusion
This Legislative Instrument is compatible with human rights.

Minister for Immigration and Border Protection

ATTACHMENT B

Details of the *Migration Amendment (Visa Labels) Regulation 2015*

Section 1 – Name of instrument

This section provides that the title of the Regulation is the *Migration Amendment (Visa Labels) Regulation 2015* (the Regulation).

Section 2 – Commencement

Subsection 2(1) provides that each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

The table provides that the whole of the instrument commences on 1 September 2015.

The note to subsection 2(1) provides that this table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

Subsection 2(2) also provides that any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

The purpose of this section is to provide for when the amendments made by the Regulation commence.

Section 3 – Authority

This section provides that the Regulation is made under the *Migration Act 1958* (the Migration Act).

The purpose of this section is to set out the Act under which the Regulation is made.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

The purpose of this section is to provide for how the amendments in the Regulation are to operate.

Schedule 1 – Amendments

Item 1 – Division 2.4 of Part 2

This item repeals Division 2.4 of Part 2 of the *Migration Regulations 1994* (the Migration Regulations).

Division 2.4 of Part 2 of the Migration Regulations (regulations 2.17 to 2.19C) relates to prescribed evidence of visas pursuant to sections 70 to 71B of the Migration Act. Division 2.4 of Part 2 of the Migration Regulations contains the following provisions:

- regulation 2.17 specifies the type of evidence that is required (pursuant to subsection 70(1) of the Migration Act);
- regulation 2.18 provides for the ways in which a request for evidence of a visa may be made (pursuant to paragraph 70(2)(a) of the Migration Act);
- regulation 2.19 sets out the places at which a person may lodge a request to be given a prescribed form of evidence of a visa (pursuant to paragraph 70(2)(b) of the Migration Act);
- regulation 2.19A sets out the amount of visa evidence charge that must accompany a request for a prescribed form of evidence of a visa (pursuant to subsection 71(2) of the Migration Act);
- regulation 2.19B provides for a circumstance in which a prescribed form of evidence of a visa may be requested (pursuant to paragraph 71B(1)(a) of the Migration Act); and
- regulation 2.19C sets out arrangements for the refund to a person of an amount of visa evidence charge (pursuant to paragraph 71B(1)(d) of the Migration Act).

The repeal of Division 2.4 of Part 2 of the Regulations will result in Subdivision AE of Division 3 of Part 2 of the Migration Act becoming, in effect, inoperative. This ceases the remaining requirement to provide a visa label as prescribed evidence of a visa. This aligns with the Government's ongoing shift towards promoting digital service delivery channels for the public.

Item 2 – Schedule 13

This item inserts in its appropriate numerical position in Schedule 13 to the Regulations 'Part 45 – Amendments made by the Migration Amendment (Visa Labels) Regulation 2015'.

This item inserts clause 4501 'Operation of Schedule 1' which provides that despite the repeal of Division 2.4 of Part 2 of these Regulations by Schedule 1 to the Regulation, that Division, as in force immediately before the repeal, continues to apply on and after 1 September 2015 in relation to a request made under section 70 of the Migration Act for evidence of a visa if:

- the request was made before 1 September 2015; and
- the visa evidence charge for the request had been paid before 1 September 2015.

The intention behind item 2 of Schedule 1 to the Regulation is to ensure that any request made under section 70 of the Migration Act for evidence of a visa will be a valid request if the request was made before 1 September 2015 and the visa evidence charge for the request had been paid before 1 September 2015. A visa label must be provided in this circumstance.

The Hon Stuart Robert MP

Minister for Veterans' Affairs
Minister for Human Services
Minister Assisting the Prime Minister for the Centenary of ANZAC

B15/0913

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

I write in response to the letter of 11 September 2015 from the Secretary of the Senate Standing Committee on Regulations and Ordinances (the Committee) regarding comments by the Committee in the Delegated Legislation Monitor (10 of 2015).

The comments relate to the Veterans' Children Education Scheme (VCES) and the Military Rehabilitation and Compensation Act Education and Training Scheme (MRCAETS). These legislative instruments are administered by the Department of Veterans' Affairs (DVA). The Committee noted its policy on delegation-powers, namely that such powers should be circumscribed, and questioned why the delegation power in paragraph 8.1.2 of the instruments needed to be so broad.

Specifically, the Committee's concern is with paragraph 8.1.2 in both the VCES and MRCAETS that enables, respectively, the relevant powers of the Repatriation Commission and the Military Rehabilitation and Compensation Commission (the Commissions) to be delegated to, essentially, any member of the Australian Public Service.

Although paragraph 8.1.2 is expressed in broad terms, nevertheless delegations of Commission powers under the VCES and MRCAETS are made in separate instruments that are approved by the Commissions. Accordingly there is high level scrutiny of the types of powers being delegated and of the people who can exercise those powers.

Further, the level of complexity of the decision making is low. The delegate is exercising their power in prescribed circumstances that are already detailed in the relevant legislation. In simple terms, the delegate is determining eligibility against prescribed criteria and rates of payment.

I am advised by DVA that although most decisions under the Schemes are made below the SES level, decisions on complex cases under the VCES or MRCAETS are made by Band 1 or 2 SES officers who hold the necessary delegations.

Therefore, I am confident that there is a sufficient safeguard for ensuring that only appropriate delegations will be made and that the powers being delegated are clearly defined through other legislation. I further note that circumscribing the delegation-power could limit the flexibility of the Commissions.

I trust this information satisfies the Committee's concern.

Yours sincerely

Stuart Robert

TREASURER

Ref: MS15-000080

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House, Canberra

Dear Chair

The Senate Standing Committee on Regulations and Ordinances has requested further information in relation to the issues identified in the *Delegated legislation monitor* No. 12, concerning the *Taxation Administration Act 1953 – Pay as you go withholding – PAYG Withholding Variation: Allowances – Legislative Instrument [F2015L01047]* for which I am the responsible minister.

The legislative instrument provides that from 1 July 2015 there is no requirement for a payer to withhold tax cents per kilometre car allowances where the payment amount does not exceed an approved rate. The approved rate has been set at 66 cents per kilometre. This was based on the 2015 Federal Budget announcement to modernise the methods used for calculating work-related car expense deductions. Part of the changes amends the three rates based on engine capacity (currently 77 cents, 76 cents and 65 cents) to one (66 cents) from 1 July 2015.

The primary legislation to give effect to the Budget announcement is currently in the lower house as Schedule 1 to *Tax and Superannuation Laws Amendment (2015 Measures No. 5) Bill 2015.*

The Committee has sought further information about how the legislative instrument operates in the event that the measure is not ultimately confirmed by primary legislation. The following information is provided to address these circumstances, assuming that this outcome is known by the end of the 2016 income year, given the measure is intended to commence on 1 July 2015:

- In their 2016 tax return, employees will be entitled to claim deductions according to the engine size of their car and use the three rates based on engine capacity.

- Noting that employers are free to pay allowances that are less than or more than the approved cents per kilometre rate, if the allowance was paid at the 66 cent rate, employees with larger engines may be able to claim a larger deduction at the rate of 77 cents or 76 cents per kilometre.

- If the engine size of the car means the deduction for car expenses should be 65 cents per kilometre, and the employee was paid an allowance at a higher rate, the employee's available deduction (if they cannot fully substantiate expenses) will be limited to the 65 cents rate.

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- The legislative instrument, if not disallowed, will continue to operate as it does not refer to a specific rate. When it is known that the legislation will not proceed, the approved rate would be amended to reflect the three rates based on engine capacity.

- For allowances paid after the amendment, a payer would not be required to withhold from a car allowance where the payment amount does not exceed these three approved rates.

The ATO will provide guidance for employees to help them correctly complete their tax return, explaining how to include the car allowance as income and at what rate a deduction for the work-related car expenses can be claimed without substantiation.

I trust this information addresses the Committees concerns regarding operation of this legislative instrument.

Yours sincerely

The Hon Scott Morrison MP

27 / 10 /2015

Appendix 2
Guideline on consultation

Purpose

This guideline provides information on preparing an explanatory statement (ES) to accompany a legislative instrument, specifically in relation to the requirement that such statements must describe the nature of any consultation undertaken or explain why no such consultation was undertaken.

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the *Legislative Instruments Act 2003* (the Act) regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister or instrument-maker seeking further information and appropriate amendment of the ES.

Ensuring that the technical requirements of the Act are met in the first instance will negate the need for the committee to write to the relevant minister or instrument-maker seeking compliance, and ensure that an instrument is not potentially subject to disallowance.

It is important to note that the committee's concern in this area is to ensure only that an ES is technically compliant with the descriptive requirements of the Act regarding consultation, and that the question of whether consultation that has been undertaken is appropriate is a matter decided by the instrument-maker at the time an instrument is made.

However, the nature of any consultation undertaken may be separately relevant to issues arising from the committee's scrutiny principles, and in such cases the committee may consider the character and scope of any consultation undertaken more broadly.

Requirements of the *Legislative Instruments Act 2003*

Section 17 of the Act requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business.

Section 18 of the Act, however, provides that in some circumstances such consultation may be 'unnecessary or inappropriate'.

It is important to note that section 26 of the Act requires that ESs describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met. However, consultation that has been undertaken under a RIS process will generally satisfy the requirements of the Act, provided that that consultation is adequately described (see below).

If a RIS or similar assessment has been prepared, it should be provided to the committee along with the ES.

Describing the nature of consultation

To meet the requirements of section 26 of the Act, an ES must describe the nature of any consultation that has been undertaken. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

Where consultation has taken place, the ES to an instrument should set out the following information:

- **Method and purpose of consultation**: An ES should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An ES should avoid bare statements such as 'Consultation was undertaken'.
- **Bodies/groups/individuals consulted**: An ES should specify the actual names of departments, bodies, agencies, groups et cetera that were consulted. An ES should avoid overly generalised statements such as 'Relevant stakeholders were consulted'.
- **Issues raised in consultations and outcomes**: An ES should identify the nature of any issues raised in consultations, as well as the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

Explaining why consultation has not been undertaken

To meet the requirements of section 26 of the Act, an ES must explain why no consultation was undertaken. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

In explaining why no consultation has taken place, it is important to note the following considerations:

- **Specific examples listed in the Act**: Section 18 lists a number of examples where an instrument-maker may be satisfied that consultation is unnecessary or inappropriate in relation to a specific instrument. This list is not exhaustive of the grounds which may be advanced as to why consultation was not undertaken in a given case. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.
- **Timing of consultation**: The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 26 of the Act.

In some cases, consultation is conducted in relation to the primary legislation which authorises the making of an instrument of delegated legislation, and this consultation is cited for the purposes of satisfying the requirements of the Act. The committee may regard this as acceptable provided that (a) the primary legislation and the instrument are made at or about the same time and (b) the consultation addresses the matters dealt with in the delegated legislation.

Seeking further advice or information

Further information is available through the committee's website at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances or by contacting the committee secretariat at:

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